IN THE SENATE OF THE UNITED STATES.

JUNE 7, 1860.—Ordered to be printed.

Mr. BAYARD made the following

# REPORT.

[To accompany Bill S. 496.]

*The Committee on the Judiciary, to whom was referred the return of Mathew Johnson, and the return of Silas Carleton, with the accompanying papers, with instructions to "inquire and report whether any, and what, further proceedings may be necessary to vindicate the authority of the Senate and to effect the arrest of the witnesses named in the warrants," have considered the subject referred, and submit the following report:*

That one Frank B. Sanborn was duly summoned on the 16th day of January, A. D. 1860, to appear and testify before a select committee of the Senate, which was authorized by the resolution constituting that committee to send for persons and papers, and refused or failed to obey the summons. That, in consequence of this refusal or failure to appear before the said committee, in obedience to the summons, the Senate, by a resolution passed on the 15th of February, A. D. 1860, directed the President of the Senate to issue his warrant to the Sergeant-at-Arms, commanding him to take into custody the body of the said Sanborn, wherever to be found, and to have the same forthwith before the bar of the Senate, to answer for contempt of its authority in thus failing to appear before the said committee. In accordance with the order of the Senate, a warrant was issued, on the 16th of February, 1860, by the President of the Senate, under its official seal, directed to Dunning R. McNair, Sergeant-at-Arms of the Senate of the United States, commanding him to take the body of the said Sanborn and forthwith have him before the bar of the Senate, to answer for the contempt of its authority in failing to appear before its said committee. By indorsement on the warrant, the Sergeant-at-Arms authorized and empowered Silas Carleton to execute the same as his deputy.

It further appears, by the return of Carleton, that in pursuance of the authority thus delegated to him, he, the said Carleton, did, on the 3d day of April, 1860, arrest the said Frank B. Sanborn at Concord, in Middlesex county, Massachusetts, and that, on the same day, he

was taken out of his custody by the deputy sheriff of Middlesex county, by virtue of a writ of *habeas corpus*, issued in vacation by one of the associate justices of the supreme judicial court of Massachusetts; that the writ was made returnable before the chief justice of the said court, or any one justice in vacation, and was returned by the deputy sheriff before the chief justice on the 4th of April, 1860; that in accordance with the exigency of the writ, the said Carleton appeared before the said chief justice on the same day and made his return in writing of the cause for taking and detaining the said Sanborn.

It also appears, that after the return made by Carleton, counsel were heard by the chief justice, both in support of the legality of the arrest and detention of the said Sanborn by the said Carleton, as a deputy of the Sergeant-at-Arms, and in opposition thereto; and that after the hearing, the chief justice decided that the said Carleton had no authority to make the arrest, and no legal right to hold the prisoner; and, therefore, he discharged the said Sanborn from the custody of the said Carleton.

To this order for the discharge of Sanborn, exceptions were filed by the counsel of Carleton, and allowed by the chief justice, and the matter will be heard hereafter before the supreme judicial court of Massachusetts on appeal. The order discharged the prisoner merely on the ground that the warrant was insufficient in law to justify the said Carleton in making the arrest, and recourse must be had to the opinion of the chief justice (who had consulted all his associate justices but one) for the grounds on which the warrant was held to be insufficient. From that opinion it appears that three objections were taken to the warrant, on the face of it, as rendering it insufficient to justify the arrest of Sanborn.

1. "That the Sergeant-at-Arms, in his capacity as an officer of the Senate, had no authority to execute process out of the limits of the District of Columbia, over which the United States Senate have, by the Constitution, exclusive general jurisdiction.

2. "That the Sergeant-at-Arms is not an officer known to the Constitution or laws of the United States, as a general executive officer, of known powers, like a sheriff or marshal; that he is appointed and recognized by the rules of the Senate as an officer exercising powers regulated by the rules and orders of the Senate, and can only exercise such powers as are conferred on him by such general rules and orders, made with a view to the regular proceedings of the Senate; or such as may be conferred by the Senate by special resolves and acts, as a single department of the government, without the concurrence of the other members of the government.

3. "That, by the warrant returned, the power to arrest the respondent was in terms limited to McNair, the Sergeant-at-Arms, and could not be executed by a deputy."

In the first objection no opinion is expressed, though it seems to the committee quite obvious that if the Senate and House of Representatives of the United States, in their legislative capacity, have power to summon and enforce the attendance of witnesses, when deemed by them respectively necessary for the proper performance of their legislative functions, the jurisdiction of each body must be coextensive

with the United States, as the power of Congress over all matters delegated by the Constitution of the United States, and the general laws made in pursuance of those delegated powers extend over the United States. The special and exclusive authority of Congress in either the District of Columbia or in a Territory of the United States, can have no greater effect in confining the right to obtain testimony for the purpose of general legislation, than it would in case the Senate was sitting to try an impeachment, or the House of Representatives as an inquest for the purpose of preferring articles of impeachment. In the latter cases, the powers vested by the Constitution in each body would be incapable of execution, unless the power to enforce the attendance of witnesses was coextensive with the United States; and if the power exists in each body to summon and enforce the attendance of witnesses for *legislative* purposes, the jurisdiction must be equally extensive, or the power is nugatory.

The Senate having already decided that it does possess the power to enforce the attendance of witnesses for legislative purposes, and no conflict having arisen between the judiciary of Massachusetts and the Senate in relation to its possession of this power, it is not deemed requisite to vindicate its existence as necessarily implied by the authority vested in the Senate in its legislative, as well as in its executive or judicial capacity, or to define the limits by which it is qualified. The ground, however, on which the chief justice ordered the discharge, is stated in the third objection. That supposing the warrant issued to the Sergeant-at-Arms to be valid, and to justify an arrest by *him*, yet it appears by its terms that it was given to him alone, and that there is nothing to indicate an intention on the part of the Senate to have the arrest under it made by any other person. That no authority is, in fact, given by the warrant to delegate its execution to any other person. After stating what is supposed to be the general rule of the common law, "that a delegated authority to one does not authorize him to delegate it to another." "*Delegata potestas non potest delegari.*" The chief justice proceeds to say, that "a special authority is in the nature of a trust. It implies confidence in the ability, skill, or discretion of the party intrusted. The author of such a power may extend it, if he will, as is done in ordinary powers of attorney, giving power to one, or his substitute or substitutes, to do the acts authorized. But when it is not so extended it is limited to the person named." On the special ground then, that the *respondent* (Carleton) had no legal authority to make the arrest, and no legal authority to detain the prisoner in custody, the chief justice discharged Sanborn from the custody of Carleton.

It appears from the proceedings that, though summary in their nature, the chief justice was aided and assisted by all the other judges of the supreme judicial court, except one, and that the objection which prevailed on the hearing of the *habeas corpus* is technical in its nature, and can be removed as to all future cases by legislative provision. Your committee have reported a bill for that purpose, conferring on the Sergeant-at-Arms of the Senate and the Sergeant-at-Arms of the House of Representatives the power to serve or execute the mandates,

precepts, and warrants of their respective houses by a deputy or deputies.

Controlled, however, as your committee has been, in reporting this bill, by a desire to avoid any conflict between the judiciary of a State and the Senate of the United States, and conceding the high character of the tribunal by which the decision has been made, the decision made by the chief justice, in Sanborn's case, seems so questionable, that it ought to be revised in the ultimate tribunal to which an appeal can be carried. It may be freely admitted that all duties involving the exercise of discretion and judgment cannot be delegated, unless the authority is expressly given to the person intrusted with the performance of those duties to act by deputy; but both on principle and authority, it seems equally clear, that by the general rule of the common law, and indeed by the general rule of law in relation to the execution of public trusts, founded both on convenience and necessity, every public officer may, for merely ministerial purposes, appoint a deputy. That the service of a warrant, whether by distress upon goods and chattels or by arrest of the person, is a merely ministerial act, seems scarcely questionable.

A constable may appoint a deputy to execute a warrant to arrest. (Rolles's Abg., vol. 1, part 2, p. 591; Philps *vs.* Winchcombe, Bulstrode, part 3, p. 77.) There is a distinction between the right to appoint a general deputy, and to give authority to a special deputy to do a single act. In ministerial cases, a *general deputy* may authorize a third person to act in his behalf as his deputy; and therefore the deputy of a deputy steward of a manor, it was held, could take a surrender out of court. (Parker *vs.* Kett, 1 Lord Raymond, p. 658.) This distinction is also recognized in Hunt *vs.* Burrell *et al.*, 5 Johns. Reps., Rep. 137. The authority relied on by the chief justice in support of the general maxim, "*Delegata potestas non potest delegari*," is Broom's Law Maxims, (3d ed., p. 755;) and the authorities quoted in support of the text show that the application of the maxim is confined to judicial acts, or acts involving the exercise of discretion and judgment.

The case in 2 Co. Inst., 597, is the case of the Court of Exchequer acting judicially, and in Rolles's Abg. (*supra*,) the reason assigned why a constable can act by deputy is "*car ceo nest ascum judicial office.*"

Broom, at page 757, 3d ed., says: "For the ordinary rule is, that although a *ministerial* officer may appoint a deputy, a *judicial* officer cannot." And, on the same page, the author further remarks: "Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such an act be within the scope of his own legitimate authority."

But the rule as to the delegation of ministerial authority is most clearly vindicated and established in the case of Walsh *vs.* Southworth and others, 6 Ex. Rep., p. 150. In this case, a warrant was directed to the overseer of a township to levy a rate; and the defendants, in an action of trespass against them for breaking and entering the dwelling-

house of the plaintiff, justified the entry as made by them under the warrant, as servants of the overseer to whom the warrant was directed. The court held, on general principles, that the act was merely ministerial; that the overseer could appoint a deputy; and that the word servant, on general demurrer, was equivalent to that of deputy.

The language of the judges leaves no room for doubt as to the point decided, or the general principle on which it was so decided. Pollock, C. B.—"Then the question is, whether the plea is good. The chief objection which has been urged against it is, that the church-wardens and overseers had no power to appoint a deputy for the purpose of executing the warrant. But it is quite clear that *for mere ministerial purposes every public officer may appoint a deputy;* as for the performance of acts which do not require any exercise of discretion or judgment. Such duties as church wardens and overseers often have to perform could not be performed at all if they were always obliged to act in person, and could not act by deputy. They might often be required to perform the same kind of duty at two different places at one and the same time, which they would be unable to do unless they had the power of deputing the performance of the act. Referring, therefore, both to principle and to authority, and as a matter of convenience, it seems to be quite clear that church-wardens and overseers may appoint a deputy in such a case as the present."

Park, B.—"With respect to the first point, it appears from the authorities which have been referred to by the learned counsel for the plaintiff, that a public officer, whose duty is merely ministerial, may always appoint a deputy; and, consequently, that objection to the plea fails, as the allegation that the defendants acted as servants to the church-wardens and overseers is sufficient upon general demurrer."

Martin, B.—"I think that the plea is rightly framed, in stating that the defendants acted as the servants of the overseers, and did the act complained of by their command. I think that the execution of a warrant is purely such a ministerial duty as to justify the overseers in deputing it to other parties."

The reasoning in this case is as satisfactory as to the principle or rule of delegation of authority by a public officer, as the weight of authority ought to be, from the high character of the court. But the chief justice also relies upon a case decided in Massachusetts, Wood *vs.* Ross, 11 Mass. Rep., 271. An examination of that case will show that it proceeds upon the peculiar provisions of the statutes of the Commonwealth of Massachusetts.

By the general provisions of those statutes, the forms of writs are given, and generally the provision is that they are to be directed to the sheriff, or other officer, or his deputies; but in the particular case decided, the statutes prescribed that the writ, "*de homine replegiando*," should be directed to the sheriff, omitting the direction to his deputies. The court held that this writ could be served by the sheriff alone, but the reasoning shows that the decision was grounded mainly on the peculiar provisions of the Massachusetts statutes, and partly on the fact; that some of the duty imposed by the act was clearly of a judicial nature.

Parker, C. J., who delivered the opinion of the court, (at page 277,) says:

"From all which circumstances, we apprehend that the forms contained in the statutes were prepared with care; and that there was a cause for the distinction between those in which the mandate is to the sheriff and his deputies, and those in which it is to the sheriff only." Again: at page 278, "yet, even in this instance, it will be found that some of the duty imposed by the statute upon the sheriff is clearly of a judicial nature."

These are the only authorities cited in support of the decision in Sanborn's case. That the provisions of the statutes of Massachusetts which require, in general, a writ to be directed to the officer, *or his deputies*, are peculiar, and not according to the course and practice of the common law, is believed to be undeniable; and it is doubtful whether such a form is adopted in the judicial proceedings of any other State of the Union. Be this as it may, the case in 11th Massachusetts Reports was decided solely on the ground of general statutory provisions, as indicating legislative intention, and can have no application to a warrant issued by the Senate of the United States, in which the power granted and the extent of the officer's authority should be decided on general principles applied to the nature of the office and the purely ministerial character of the act.

But the chief justice, in his opinion, speaks of the Sergeant-at-Arms of the Senate as an officer of that house, and not a general officer known to the law, as a sheriff, having power to appoint deputies, or to act by deputation, in particular cases. It is presumed that any court in the United States would feel itself bound to notice judicially the federal Constitution; and section 3, article 1, gives to the Senate the right to choose their officers; and section five, of the same article, requires each house to keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy.

It seems reasonable that the published journals of either house should be judicially noticed by any court in the United States; but if not so noticed, certainly on proper proof of the journal of either house exhibited to a court, it should be held conclusive evidence of any resolution appearing by it to have been passed. We may look then (which the chief justice did not) to the resolution of the Senate, by which the office of Sergeant-at-Arms was created, for the nature of the office and the duties it imposed on the officer.

In its first organization, the Senate had no Sergeant-at-Arms, but only doorkeepers, who had no prescribed duties. This organization continued until February, 1798; but a then pending impeachment evincing the necessity of a further executive officer, the Senate, on the 5th of February, 1798, passed the following resolution:

"*Resolved*, That the Doorkeeper of the Senate be, and he is hereby, invested with the authority of Sergeant-at-Arms, to hold said office during the pleasure of the Senate, whose duty it shall be to execute the commands of the Senate, from time to time, and *all such process as shall be directed to him by the President of the Senate.*"

The Sergeant-at-Arms has always been appointed under this resolution, prescribing his duties, since its adoption.

It is evident from the resolution that the office itself is ministerial, and among the duties imposed is, to execute all such process as shall be directed to him by the President of the Senate.

It will not be denied that serving a warrant of arrest is the execution of process, and on the authorities cited it is a purely ministerial act, and therefore, both on principle and authority, may be lawfully executed by any person authorized by the officer to perform the particular act.

It is not contended that a sergeant-at-arms can appoint a general deputy, vesting all his own functions in him, but that he may on general principles of law depute the authority to perform a merely ministerial act to a third person, who becomes, as to that act, his special deputy.

The reasoning of the chief baron in Walsh *vs.* Southworth is more strongly applicable to a sergeant-at-arms than to a church-warden or overseer. The duties imposed by the resolution of the Senate on their officer could not possibly be performed without deputing the service of process to third persons, and the legal intendment, therefore, must be that the Senate intended, that process issued to the Sergeant-at-Arms by its President should be served by deputy. The necessity for the creation of the office became obvious also in consequence of the impending trial of an impeachment, where process against many witnesses at long distances had of necessity to be served, and unless the principle of law be sound that a public officer may perform merely ministerial acts by deputy, the creation of the office by the resolution was utterly useless. The doorkeeper could have attended the Senate sitting for the trial of an impeachment quite as efficiently as when sitting in its legislative capacity; and the plain intent of the resolution was not merely to change the name of the officer from "doorkeeper" to "sergeant-at-arms," but, to define the duties of the office—the execution of the mandates and service of the process of the Senate, duties which certainly did not belong to a doorkeeper either *ex vi termini* or under any previous resolution of the Senate.

The committee, for the reasons stated, believing that the summary decision made in Sanborn's case is erroneous, are unwilling to suppose that it will not be corrected on more mature consideration by the learned and eminent tribunal to which it has been carried by appeal.

The bill which has been reported by the committee was not believed to be absolutely necessary, but its object is to remove all possibility of future difficulties on technical grounds, as to the proper person to execute the process of the Senate or House of Representatives.

The committee find no reason for further legislation than the bill which has been reported, in the return of the deputy of the Sergeant-at-Arms, to whom process for the arrest of John Brown, jr., was confided. They submit that the necessity and propriety of vindicating the authority of the Senate in regard to this defaulting witness belongs more appropriately to the select committee before whom the witness was summoned to appear, who, with their better knowledge of the matters intrusted to them for investigation, can determine more prop-

erly whether the public interest requires the attendance of the witness Brown to be enforced. The bill reported, in the opinion of the committee, will give ample authority to arrest any witness whose attendance is deemed material by the select committee.

They ask to be discharged from the further consideration of the resolution referred to them.